

NATURAL GUARDIAN LP

IBLA 2000-31

Decided May 31, 2000

Appeal from a decision of the Field Manager, Idaho Falls Field Office, Bureau of Land Management, denying an application for issuance of a right-of-way on public land in a wilderness study area. IDI 33113.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Wilderness Act

The Federal Land Policy and Management Act of 1976, 43 U.S.C. ' 1782(c) (1994), requires the Secretary to regulate activities on lands under wilderness review to prevent impairment of their suitability for inclusion in the wilderness system. However, operations that impair wilderness suitability may be allowed if they are conducted in the same manner or degree as on Oct. 21, 1976.

2. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Generally--Wilderness Act

An appellant appealing denial of an application for a right-of-way across public land must show that the decision was premised either on a clear error of law or a demonstrable error of fact.

APPEARANCES: Blair Grover, Esq., Rigby, Idaho, for Appellant; Joe Kraayenbrink, Field Manager, Idaho Falls Field Office, Idaho Falls, Idaho, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Natural Guardian LP (Appellant) has appealed from the September 21, 1999, decision of the Field Manager, Idaho Falls Field Office, Bureau of Land Management (BLM), denying Appellant's application for issuance of a right-of-way (ROW) on public land in a wilderness study area (WSA) for a wheel pivot irrigation system in the SW1/4NW1/4 sec. 20, T. 2 N., R. 36 E., Boise Meridian, Bonneville County, Idaho. The ROW application denied in

the September 21, 1999, decision involves approximately 2 acre within the Hell's Half Acre WSA. The decision appealed from also determined the wheel pivot irrigation system is an existing and an unauthorized use as defined by current regulations found at 43 C.F.R. ' 2800.0-5(u). The Appellant's Petition for Stay was denied in an order issued by the Board on November 24, 1999.

In its Statement of Reasons (SOR) for appeal, Appellant states, in pertinent part:

1. The Bureau of Land Management (BLM) lands in question are located approximately ten (10) miles west of Idaho Falls, Idaho, Bonneville County, and approximately two (2) miles south on U.S. Highway 20 which connects Idaho Falls with the Idaho National Engineering and Environmental Laboratory (INEEL), and Arco Idaho. The highway is heavily traveled by both private vehicles and INEEL buses and trucks. Area farm roads are less than one-quarter of a mile from the alleged trespass. (See area map attached as Exhibit A).

Petitioner's land is adjacent to the BLM land and borders it on two sides. It has been farmed, cultivated and irrigated for more than 25 years. The area of trespass is not isolated, primitive, or difficult to access.

2. There has never been a survey so the boundaries were not flagged nor staked. Consequently, historically the exact location of the boundary between petitioner and the BLM was not known. Apparently, the BLM has now identified the boundary by a GPS method. Attached as Exhibit B is an aerial photo showing the land in question. The sliver of land colored yellow is where the wheel crosses, the orange is where the boom extends, and the blue is the outside perimeter of where the water sprinkles when under pressure. Attached as Exhibit C is a rough sketch illustrating the corner, and the alleged trespass.

3. Petitioner's predecessor had been farming the corner so, it appeared to be part of the field Petitioner had acquired. Consequently, the pivot irrigation system was designed and erected in good faith and with the belief the alleged trespass property belonged to Petitioner and Petitioner's predecessor.

4. Mechanical and/or electronic devices can be constructed and/or attached to the pivot to shut the water off when it reaches the BLM land so there is no water sprinkled on said lands. However, the boom will extend approximately 65 feet over the BLM land and the wheel will cross over approximately fifteen (15) feet on the east edge, and approximately eighteen (18) feet on the north edge traveling about twenty-three (23) feet on BLM lands, all as shown on Exhibit B and C.

There is no way to avoid having the wheel cross, without dismantling the pivot, shortening it, and reassembling it with a swivel so it will avoid BLM land. Petitioner estimates that cost at about \$25,000. Petitioner is a tax payer, and does not understand why it should be forced to such great expense when the alleged impact is virtually negligible.

5. As shown on the attached aerial photo, there is lava and/or cultivated lands south and east of the BLM lands and lava or cultivated lands west of the trespass land belonging to Petitioner. The lava acreage contributes to the naturalness of the area [and] is much larger than the area of trespass. Petitioner has been and continues to be willing to make an exchange of all or some of either of those parcels (lava or cultivated lands) for the corner that allegedly trespasses on BLM land. The exchange lands would be virtually identical because they are adjacent to and the same as the alleged corner.

6. The surface disturbance is diminimus and it has virtually no surface impact. Shortening the circle a few feet so the wheel does not travel 23 feet on BLM lands has no practical effect on the use, solitude, and isolation of the BLM property in question.

7. Petitioner more than makes up the very small area of trespass by leaving other adjacent areas unirrigated and unfarmed. To the extent "wilderness" is to protect or preserve plant or animal life, the unfarmed corner is much more significant because it is much larger.

8. Deminimus trespass will have no effect on any past or ongoing study because it is so small and so near the edge of the study area.

(SOR at 1-2.)

In its Answer to Appellant's Petition for Stay (Answer to Petition), 1/ the BLM Field Manager stated:

A Dependent Resurvey and Subdivision, T. 2N., R. 36 E. Of the Boise Meridian was performed by Gerald Hochstrasser, Cadastral Surveyor, Bureau of Land Management. The survey was commenced on October 20, 1978 and completed October 27, 1978 pursuant to Special Instructions dated October 18, 1978, for Group No. 581, Idaho. On February 7, 1980 the survey was accepted for the Director, by Donald Voorhees, Chief, Cadastral Survey Examination and Approval Staff. In the course of his survey

1/ BLM has not filed an Answer to Appellant's SOR in this case.

Hochstrasser subdivided section 20 and monumented the NW 1/16 sec. cor. of sec. 20 with a regulation iron post monument. Field reviews have determined that the pivot irrigation system crosses public lands included in the Hell's Half Acre Wilderness Study Area (WSA).

(Answer to Petition at 1.) BLM further stated that Appellant's offer of an exchange could not be accepted as the land in question is situated within a WSA. Id.

The Hell's Half Acre WSA is an area of the public lands within Bonneville County, Idaho, which has been determined by BLM to exhibit wilderness characteristics, as defined by section 2(c) of the Wilderness Act, 16 U.S.C. ' 1131(c) (1994). It is currently being reviewed by Congress for possible designation and protection as a wilderness area, pursuant to the Wilderness Act, as amended, 16 U.S.C. ' 1131!1136 (1994).

[1] During the period of such review and until Congress either designates the lands or releases them from further consideration, BLM is required to manage the public lands within the WSA in accordance with section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. ' 1782(c) (1994). Committee for Idaho's High Desert, 139 IBLA 251, 253 (1997); Ronald A. Pene, 135 IBLA 143, 147-48 (1996). This statutory provision requires BLM to manage the lands "in a manner so as not to impair the[ir] suitability * * * for preservation as wilderness." 43 U.S.C. ' 1782(c) (1994); Sierra Club v. Hodel, 848 F.2d 1068, 1085 (10th Cir. 1988); Nevada Outdoor Recreation Association, 136 IBLA 340, 342 (1996).

The management of WSA lands by BLM is governed by its Interim Management Policy and Guidelines for Lands under Wilderness Review (IMP). 2/ The IMP sets forth certain nonimpairment criteria that are generally designed to ensure that no activity will occur that will jeopardize or negatively affect Congress' ability to find that the WSA has the necessary wilderness characteristics and thus to designate it as wilderness. Committee for Idaho's High Desert, 139 IBLA at 253.

The nonimpairment criteria were developed by BLM in order to ensure their compliance with the section 603(c) nonimpairment mandate. See Rocky Mountain Oil & Gas Association v. Watt, 696 F.2d 734, 739 (10th Cir. 1982); California Department of Transportation, 111 IBLA 251, 253 (1989). Under the criteria, BLM may not allow an activity within a WSA that would cause an impact that could not be reclaimed to the point of being substantially unnoticeable in the area as a whole by the time the Secretary is scheduled to make his recommendation to the President on the suitability of the area for preservation as wilderness. They also provide that BLM may not allow

2/ The IMP was first published in the Federal Register on Dec. 12, 1979 (44 Fed. Reg. 72013). It was later amended in ways that are not pertinent to this case (48 Fed. Reg. 31854 (July 12, 1983)), and then incorporated in a Handbook (H!8550!1 (Rel. 8!36 (Nov. 10, 1987))), which was part of BLM's Manual. See Committee for Idaho's High Desert, 139 IBLA at 253 n.3. The current Handbook is H!8550!1 (Rel. 8!67 (July 5, 1995)).

an activity within a WSA that, after termination of the activity and any needed reclamation, would degrade the wilderness values in the area so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness. See BLM Manual, I.B.6.; see also Charles J. Waag, 142 IBLA 92, 95 (1997).

Thus, in order to be entitled to undertake activity within the WSA in conjunction with its farming operation, Appellant must demonstrate that such activity will not impair the suitability of the WSA for designation as wilderness. The Gem Shop, Inc., 136 IBLA 55, 57 (1996); John Loskot, 71 IBLA 165, 167 (1983). The Appellant has not done this.

[2] An appellant seeking reversal of a decision involving lands in a WSA must show the decision was premised either on a clear error of law or a demonstrable error of fact. Utah Wilderness Association, 80 IBLA 64, 68 (1984); Southwest Resource Council, Inc., 73 IBLA 39, 42 (1983); see John W. Black, 63 IBLA 165, 168 (1982); Union Oil Co. (On Reconsideration), 58 IBLA 166, 171 (1981). In this case, the 1980 survey conducted by BLM's Cadastral Surveyor, described above, established that the pivot irrigation system crosses public lands included in the Hell's Half Acre WSA. The solution proposed by Appellant, exchange of private land for the 2 acre of WSA land, is not authorized as the WSA land has already been designated as subject to the nonimpairment standard. The preservation of wilderness values is paramount and is the primary consideration in evaluating any proposed action or use within a WSA. Any action which compromises the wilderness values of roadlessness, solitude, naturalness, and the opportunity for primitive and unconfined recreation must therefore be rejected. Charles J. Waag, supra at 93.

Therefore, we conclude that the Idaho Falls Field Office Manager properly denied Appellant's request for a ROW, as BLM concluded that the ROW would fail to satisfy BLM's nonimpairment criteria, and as Appellant has not overcome that conclusion by a preponderance of the evidence. California Department of Transportation, 111 IBLA 251, 253-54 (1989); Eugene Mueller, 103 IBLA 308, 311 (1988); L.C. Artman, 98 IBLA 164, 168 (1987).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge